Supreme Court of the United States

OCTOBER TERM, 1944

NO. 1294

JONES & LAUGHLIN STEEL CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR THE ALLOWANCE OF A WRIT OF CERTIORARI, TO REVIEW A DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR THE ALLOWANCE OF A WRIT OF CERTIORARI, TO REVIEW A DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

JONES & LAUGHLIN STEEL CORPORATION, the petitioner above named, respectfully presents its petition for the allowance by your honorable Court of a Writ of Certiorari to review a decree of the United States Circuit Court of Appeals for the Fifth Circuit (R. 168),[1]

[1]The transcript of record presented with this petition consists of two parts: "Volume I—Transcript of Record," which contains the pleadings, orders and decisions entered before the Board and in the Court below; and "Appendix to Petitioner's Brief," prepared in ac-

entered on March 16, 1945, by which that Court refused to set aside, but instead affirmed and enforced, a final Order (R. 90-91) which had theretofore been made against your petitioner by the respondent National Labor Relations Board.

Statement of the Matter Involved.

In this case, the Circuit Court of Appeals was called upon to review a final Order made against petitioner by the National Labor Relations Board, in what had commenced as an election and certification case, conducted by the Board under Section 9 (c) of the National Labor Relations Act, and ended as an unfair labor practice case prosecuted by the Board under Section 8 (5)—the refusal to bargain Section—of the same Act.

Petitioner, a steel manufacturer, owns a fleet of ten large river towboats, all registered steam vessels of the United States. They are operated in the pursuit of petitioner's business on the Mississippi, Ohio and Monongahela rivers, principally in the area surrounding Pittsburgh, from which petitioner obtains the materials used in steel manufacture, and in the carriage of finished products between that city and New Orleans (R. 1-2; 12). They are manned by crews made up of licensed masters and subordinate deck officers, licensed and un-

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cordance with the Rules of the United States Circuit Court of Appeals for the Fifth Circuit, which contains the relevant testimony taken before the Board and the evidentiary exhibits. In this petition and brief, references to "Volume I—Transcript of Record," will be designated "(R. ....)"; and references to the "Appendix" will be designated "(App. ....)".

licensed marine engineers, and unlicensed seamen (37 N.L.R.B. 366; 38 N.L.R.B. 352).

Prior to the year 1941, none of these maritime employees was represented by any labor union (R. 97). During the summer of that year, three labor unions made their applications, almost simultaneously, to the respondent National Labor Relations Board, under Section 9 (c) of the Act, for certifications as exclusive representatives of the three principal classes of men employed in petitioner's crews (37 N.L.R.B. 366).

Petitioner raised no question concerning the legal propriety of the claims of two of the three unions: of the National Maritime Union, which sought to represent the unlicensed seamen, and of the Marine Engineers Beneficial Association, which sought to represent the licensed marine engineers; and, when these two unions were chosen by majorities of these two classes of employees, and certified by the respondent Board (38 N.L.R.B. 352), petitioner recognized them fully and has since made written agreements with them (App. 113 a-151 a).

Thus, the petitioner's present case concerns, directly, only the third union, the National Organization Masters, Mates and Pilots of America.[2] In a petition filed with the Board August 25, 1941, this union sought to be certified as exclusive representative of all of the remaining members of petitioner's crews; *i.e.*, of all the licensed pilots, mates and masters of the steamboats (37 N.L.R.B. 366). Its legal competency to be certified

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[2]This union is sometimes hereinafter referred to as "M. M. & P."—a common nickname which appears often in the transcript.

as exclusive representative of the mates and the pilots was not disputed by petitioner, before the Board or in the Court below. Petitioner has, however, maintained throughout the proceedings that, under the Act, it cannot properly be required by the Board or by the union to permit the inclusion of the masters of its vessels within the scope of the union's jurisdiction or of the union's collective bargains. The union, on the other hand, has been unwilling to bargain for the mates and pilots only (App. 64 a); and it is this disagreement over the legal status of the masters—in which the Board has invariably supported the union's position—which has given rise to the legal controversy intended to be presented here.

The following is intended simply as a chronological description of the progress of the case until now.

In the original elections conducted by the Board on the three petitions of 1941, the M. M. & P. (unlike the other two unions) failed to qualify for certification (38 N.L.R.B. 352). Thereafter, on January 2, 1943, it filed a second petition for an election (R. 17). After a hearing held on five days' notice to petitioner, at which petitioner appeared and opposed the union's request, the Board ordered (R. 34) and held a second election, at which a majority of those who voted signified their desire to be represented by the union, for the purposes of the Act[3] (R. 35-36).

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[3]It seems fair and it may be relevant to observe that, because there were only ten licensed masters eligible to vote, as against a total of thirty-three eligible mates and pilots, the results (R. 36) of the election leave open the possibility that no licensed master employed by petitioner has desired to be represented by the union.

On March 30, 1943, a few days after the election, the Board certified the union as exclusive representative of all of the licensed officers: the mates and pilots and the masters also (R. 37-38).

Thereafter, petitioner filed with the Board two applications in which it sought an order setting aside this certification (R. 39; 42). These were denied by the Board in orders made, respectively, on July 13, 1943 (R. 41) and on August 11, 1943 (R. 44).

In the meantime, the union had demanded that petitioner bargain with it as exclusive representative of all the licensed officers, in conformity with the Board's certification. Petitioner had expressed its willingness to make an agreement with the union as representative of the mates and the pilots—omitting the masters, but this offer had been rejected, even as a stop-gap pending the outcome of further litigation of the status of the masters (App. 64 a; 111 a); and on September 2, 1943, the union filed with the Board a written charge which contended that petitioner, by refusing to bargain with it, had committed an unfair labor practice under Sections 8 (1) and 8 (5) of the Act (R. 46-47).

On September 4, 1943, the Board issued a complaint against petitioner, based on this charge (R. 48-52). Petitioner filed its written answer (R. 54-57); and on September 20, 1943, the Board held a hearing, before a Trial Examiner, on the issues raised by these pleadings (App. 42 a-151 a). In the course of the hearing, petitioner renewed its contention that certification of the union as representative of the licensed masters had been legally erroneous (App. 67 a, etc.).

On September 30, 1943, the Trial Examiner filed an "Intermediate Report," by which he recommended that petitioner's contentions be rejected and that petitioner's refusal to bargain be held an unfair labor practice (R. 58-70). Petitioner filed exceptions to the Intermediate Report, in which it embodied a Petition for Leave to Adduce Additional Evidence (R. 72-79). On November 16, 1943, the matter was argued before the Board (R. 82).

On January 19, 1944, the Board handed down its decision of the matter (R. 83-90), together with its final Order in the case—an Order by which it commanded petitioner to recognize the union as exclusive representative, under the Act, of all of the licensed officers, including the masters (R. 90-91).

On April 5, 1944, petitioner presented its Petition for Review of this Order of the Board, in the United States Circuit Court of Appeals for the Fifth Circuit (R. 1-10). On May 15, 1944, the Board filed an answer to the Petition for Review, in which it embodied a cross-petition for enforcement of its Order (R. 12-16).

On November 9, 1944, petitioner filed in the Circuit Court a Petition for Leave to Adduce Additional Evidence, showing, *inter alia,* that (as it had discovered only since the filing of the Petition for Review) the three unions mentioned above—the Locals of the National Maritime Union, the Marine Engineers Beneficial Association and the M. M. & P.—with which it had been required by the Board to negotiate and bargain, were dominated by a unified group of three officers, and that the three Locals had amalgamated their operations and programs so completely as to make them, not three independent unions, but instead a single union (R. 96;

101-102). On November 24, 1944, the Board filed an answer to this petition, which contained no denial of the facts averred by the petitioner, but which suggested that these facts had been considered immaterial by the Board in its decision of the case (R. 105-108).

On January 8, 1945, the Circuit Court heard oral arguments of the case, considering *inter alia* the questions raised by the Petition for Leave to Adduce Additional Evidence, and the Board's answer. On January 18, 1945, the Court handed down an opinion by which it determined that the Board's Order should be enforced (R. 109-113). On March 12, 1945, the Court made an order denying a petition for rehearing which had been filed by petitioner (R. 114-167; 168); and on March 16, 1945, it entered its Final Decree—the Decree sought to be reviewed here (R. 168-170). This Decree will, if it becomes effective, adopt and enforce the Board's final Order, and so require petitioner to acquiesce in the inclusion of the licensed masters in the scope of the agreements made and to be made by the unions as representatives of the other, subordinate marine employees.

Jurisdiction of This Court.

1. Under Section 10 (e) of the National Labor Relations Act (29 U.S.C. 160 (e)), this Court has jurisdiction, if an application be made within three months, to review the decision of the Circuit Court of Appeals upon Writ of Certiorari, in the manner provided in Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C. 347).

2. The Final Decree of the Circuit Court of Appeals was entered after it had denied petitioner's Petition for Rehearing, on March 16, 1945 (R. 168-170).

Questions Presented.

1. Is the power granted the National Labor Relations Board, by Section 9 (b) of the National Labor Relations Act, to determine whether any particular class of employees shall or shall not be included in an "appropriate unit" for the purposes of collective bargaining, an unlimited power or a power limited by rules of law?

2. If the Board's power is limited, do the rules of law which limit it require the Board, in its establishment of "appropriate units," to preserve traditional distinctions between management and labor, by excluding from "units" dominated by employees who have traditionally been represented by unions, executive employees who have not, traditionally, been so represented?

3. If the Board's power is limited, do the rules of law which limit it require that the Board shall exclude from an "appropriate unit," dominated by their subordinates, executive employees whose independence of the influence of the subordinates, or of the unions which represent them, is necessary or desirable to the efficiency of management and to the discharge of the executives' legal duties?

4. If the Board's power is limited by such rules of law, may the Board lawfully demand the inclusion, in an "appropriate unit" composed of their subordinate licensed officers and dominated by the seamen they command, of the licensed masters of a fleet of steam vessels?

Reasons Relied upon for the Issuance of the Writ.

As petitioner proposes to show more fully in the annexed brief supporting this petition, it is believed and contended that the Writ of Certiorari should issue because:

1. The case presents an important question of federal law which has not been, but should be, settled by this Court;
2. The decision of this question of federal law by the Circuit Court of Appeals in this case is in conflict with decisions of the same matter by the Circuit Courts of Appeals for the Third, Sixth and Seventh Circuits; and
3. The decision of the question of federal law by the Circuit Court of Appeals in this case is erroneous.

WHEREFORE, your petitioner respectfully prays that your honorable Court issue its Writ of Certiorari to the said United States Circuit Court of Appeals for the Fifth Circuit, that it review the decision aforesaid in the manner provided by law, and that thereupon said decision shall be reversed.

And your petitioner will ever pray, etc.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinions of the Court below, and of the Respondent Board.

Opinions in this case have been reported as follows:

Jones & Laughlin Steel Corporation v. N. L. R. B., 146 Fed. (2d) 833 (5 C.C.A., 1945)

In re Jones & Laughlin Steel Corporation, etc., 54 N.L.R.B. 679 (January 19, 1944)

In re Jones & Laughlin Steel Corporation, etc., 51 N.L.R.B. 1204 (August 11, 1943)

In re Jones & Laughlin Steel Corporation, etc., 47 N.L.R.B. 1272 (March 2, 1943)

In re Jones & Laughlin Steel Corporation, etc., 38 N.L.R.B. 352 (January 16, 1942)

In re Jones & Laughlin Steel Corporation, etc., 37 N.L.R.B. 366 (December 6, 1941).

Grounds on which the Jurisdiction of this Court Is Invoked.

As is stated in the petition for certiorari, the Court has jurisdiction to issue the writ in this case, by virtue of the provisions of Section 10 (e) of the National Labor Relations Act (29 U.S.C. 160 (e)), and those of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

Petitioner's Petition for Rehearing was denied by the Court below on March 12, 1945 (R. 168); and the Final Decree of that Court was entered March 16, 1945 (R. 168).

Statement of the Case.

To avoid unnecessary repetition, petitioner will rely upon the Statement of the Matter Involved which appears at pages 2 to 7 *supra,* in its petition for certiorari.

Specification of Errors Intended to Be Urged.

1. The Circuit Court erred in holding that the inclusion of licensed shipmasters in the "appropriate unit" established by the Board in this case was justified by the traditions of the maritime calling.

2. The Circuit Court erred in holding that the inclusion of licensed shipmasters in the "appropriate unit" established by the Board in this case was justified by long, satisfactory experience in the maritime calling.

3. The Circuit Court erred in holding that the respondent Board may lawfully require the inclusion of licensed shipmasters in an "appropriate unit," dominated by their subordinate officers.

4. The Circuit Court erred in holding immaterial the evidence which had been offered by petitioner (R. 101-102), that the union certified by the respondent Board as exclusive representative of petitioner's licensed masters, mates and pilots was, in fact, subject to the domination and control of the other unions which had been certified and recognized as the representatives of all of the marine engineers and seamen employed on petitioner's steam vessels.

5. The Circuit Court erred in holding that, under the National Labor Relations Act, the respondent Board

may lawfully require the owner of a fleet of steam vessels to recognize as exclusive representative, for the purposes of the National Labor Relations Act, of the licensed masters of such steam vessels, the same union which is exclusive representative of subordinate members of the crews of such vessels.

6. The Circuit Court erred in refusing to set aside the respondent Board's Order.

7. The Circuit Court erred in granting enforcement of the respondent Board's Order.

ARGUMENT.

I. This Court Should Decide the Much Disputed Question of the Nature and Limits of the Board's Authority to Include Executive and Managerial Employees in Schemes of Collective Bargaining.

1. *Statutory basis for the Board's Power: Section 9 of the National Labor Relations Act.*

Section 9 of the National Labor Relations Act fixes the status of a labor union chosen by a majority of the employees in an "appropriate unit" in these words:

> "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

And the same section delegates to the Board the power and duty to determine what employees shall, and what employees shall not, be included in any particular "unit," in these words:

> "(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

These are the only provisions of the Act which purport to give the Board the power under examination here.

2. *The growing need for a proper definition of the Board's powers, under this Section of the Act.*

Only a little reflection is required to show that the power here conferred upon the Board is a large one; that the manner of its exercise may have the most profound effects to determine the way industry is managed, and the part to be taken by labor unions in its management, in the future; and that the essential question presented here is, therefore, one of great and general importance.

Under this section of the Act, the union certified as the choice of a majority of any particular "unit," established or approved by the Board, has the power to make an employment contract which will bind the entire unit. Once such a contract has been made by the union, every member of the "appropriate unit" is bound by it. Individual contracts—between employer and any individual employee or a minority group of employees—become illicit, except perhaps to the extent that their terms conform precisely to those of the union's bargain: *J. I. Case Co. v. N. L. R. B.*, 320 U. S. 332; 88 L. Ed. 489 (1944); *Medo Photo Supply Corp. v. N. L. R. B.*, 321 U. S. 678; 88 L. Ed. 749 (1944).

This means, among other things, that any employee who is included in an "appropriate unit" must treat with great respect the labor union chosen by a majority of the members of the unit, whether his natural sentiments and his other obligations incline him in that direction or otherwise. The union certified by the Board has the legal right to insist upon a written agreement: *H. J. Heinz Co. v. N. L. R. B.*, 311 U. S. 514; 85 L. Ed. 309

(1940), and may lawfully demand the inclusion in that agreement of a provision requiring the employer to discharge any employee who fails to maintain himself as a member of the union in good standing.[1] And, whether such a "union-shop" agreement is made or not, the individual member must avoid any violation of his brotherly duties to other members of the union, and often to labor unions and laborers in general. This is a requirement of every union Constitution.

To the productive worker in a steel mill or automobile factory, or to the ordinary unlicensed seaman employed on a steam vessel, the duty of allegiance to his labor union usually involves no embarrassment in the discharge of his duties to his employer; and, therefore, the inclusion or exclusion of any particular employee or class of employees from an "appropriate unit," by the Board's order, is a matter having no profound effect upon the problem of effective management, for so long as the case involves only productive workers. But the situation becomes very different when (as in this case) the claims of the union and the orders of the Board propose to amalgamate into a "unit," dominated by subordinate employees, any employee or class of employees charged with the executive and managerial duties of commanding, instructing and supervising the work of the subordinates, and of imposing discipline or discharge upon such of them as may fail to meet the standards of efficiency fixed by the employer.

Although the principle must operate in a variety of other similar cases, this case affords one of the best

[1]See Section 8 (3) of the Act (29 U.S.C. 158 (3)); *Warehousemen's Union v. N. L. R. B.*, 121 Fed. (2d) 84 App. D.C. (1941); Cert. den. 314 U. S. 674; 86 L. Ed. 539.

possible illustrations of the difficulties which would follow a misuse of the Board's power. The duty of a shipmaster to enforce obedience and efficiency among members of his crew is one fixed not simply by the orders and ideas of the shipowner who employs him, but also by a multitude of federal statutes. Thus, the failure of a master to enforce discipline may result not only in the loss of his ship, but also in the suspension of his license and in the imposition of civil and criminal penalties: see *New York and Cuba Mail S.S. Co. v. Continental Insurance Co.*, 117 Fed. (2d) 404 (2 C.C.A., 1941). If in his efforts to perform his duties with proper courage and determination, such a man must always remember that, by offending the numerous subordinates who dominate his labor union, he may lose his good standing with the union, and that the union, in the end, controls his employment, his position can never be anything but a false one.

Of course, the same considerations apply also, though usually in a lesser degree, to any executive or foreman in any enterprise in which the productive workers have been made subject to organization, by a union which desires to extend its jurisdiction to include supervisory employees also. Bearing this in mind, it seems well to explain why, it appears, the question presented here has not arisen in any past case in this Court. The explanation is that, for years after its organization in 1935, the respondent Board included in its "appropriate units" only those employees whose inclusion was agreed upon by the employer and the union concerned in any particular case; or, when no such agreement was possible, it included in the "appropriate unit" only production and maintenance workers, care-

fully excluding managerial employees, from foremen to corporate executives, and also such other employees as clerical and office workers, plant guards and police, factory nurses and matrons, and other classes similarly excluded, by tradition, from the class of persons commonly called "labor." Until recently, this interpretation of the law appears to have been satisfactory to the unions.

For so long as this remained the Board's policy, the question presented here could not arise. Recently, however, certain of the more influential labor unions, having exhausted the possibilities of organization among production and maintenance workers, have desired to extend their jurisdiction, and—for one reason or another—to bring within the scope of their agreements such formerly excluded classes as foremen, office employees, plant policemen, and—as in this case—the masters of steam vessels. With the development of this new tendency of the labor movement, it has become increasingly necessary that the Board be given some proper standard to guide its decisions of such cases.

3. *The Board has established no sound, legal standard of decision in such cases generally.*

To guide the Board in its duty to establish appropriate units, the statute contains nothing except the words of Section 9, which provide that the "unit" established by the Board shall be adapted "to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act." The "policies of the Act" are, as this Court has said, to encourage "the practice and

procedure of collective bargaining," and to protect "the exercise by workers of full freedom of association and of negotiating the terms and conditions of their employment or other mutual aid or protection through their freely chosen representatives."[2]

Were these words of the Act to be considered without reference to any other consideration of law, the Board's course might be plain enough—it might then appear that, to encourage collective bargaining, every union should be given jurisdiction of every employee or class of employees it might seek to include within its sphere of influence. The language of the Act might permit this. It contains no words which would forbid the inclusion, in an "employer unit," of all the employees of an industrial corporation, including the president and the other executive officers.

That, of course, is not what the Act means, and that application of the Act is improbable.[3] But what does the Act mean? Or, to put the same question in more specific terms, by what principle is the Board bound to decide that the president of a corporation, or the licensed master of a steam vessel, shall or shall not be included in a "unit" of which a labor union demands jurisdiction?

This question (one not heretofore presented to this Court) has not found any consistent answer in the Board's own decisions; and it is evident that the Board has not yet adopted, and adhered to, anything which could be called an intelligible rule. A list of all the past

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[2] *Republic Steel Corp. v. N. L. R. B.*, 311 U. S. 7, 10; 85 L. Ed. 6, 9 (1940).

[3] See *In re Maryland Drydock Co.*, 49 N.L.R.B. 733 (1943).

cases, in which the Board has faced the problem, would burden and expand this brief improperly. It is sufficient to mention, briefly, the three leading cases—all decided within the last three years.

In re Union Collieries Corp., 41 N.L.R.B. 961 (1942), the Board, one member dissenting, held that, contrary to a tradition of the industry, foremen in bituminous coal mines should be included in an "appropriate unit." This was a departure from the Board's earlier policy, described above; but it was followed in several cases decided shortly afterwards.

Then, *In re Maryland Drydock Company*, 43 N.L.R.B. 733 (May 11, 1943), the Board reconsidered the matter in all of its aspects, and held that in no case—except to the extent that long established traditions should require it—could any foreman or other supervisory employee be included in an "appropriate unit," or represented by a union which represented also his subordinate employees. One member dissented.

Finally, *In re Packard Motor Company*, 60 N.L.R.B. .... (March 26, 1945)[4], the Board again examined the question in detail, in a long opinion. It observed that the *Maryland Drydock* case was almost two years old, and in effect overruled it, holding that foremen should, after all, be included in appropriate units. Again one member dissented; the dissenter, Mr. Reilly, saying at the beginning of a carefully considered dissent:

> "In my opinion, the decision we are making today does irreparable damage to the delicate balance between the conflicting interests of management

[4]Reported unofficially in Vol. 16 *Labor Relations Reporter*, p. 168.

and worker which the National Labor Relations Act sought to bring about in American Industry."

At this moment of the Board's history, no question is of greater or more general importance then the question here under scrutiny. And yet, nobody who has read these three leading cases could guess reliably the outcome of the next case in which the question shall come before the Board.

4. *The same situation exists in cases involving licensed masters of steam vessels.*

These three cases, just mentioned, the leading authorities on the subject in the Board's own reports, show that the Board has found no reliable principle to guide it in such cases, considered as a general class. The same confusion exists amongst the cases in which the status of licensed masters of steam vessels has been the particular subject of the Board's decision.

Thus, the Board has *excluded* licensed masters—in order to preserve the efficient functions of management and labor—in these cases:

In re United States Lines, 28 N.L.R.B. 896 (1941)

In re Detroit and Cleveland Navigation Co., 29 N.L.R.B. 176 (1941)

In re United Dredging Co., 30 N.L.R.B. 739, 797 (1941).

On the other hand, the Board has *included* licensed masters in a few early cases—where the employer, presumably because of his peculiar relationships with the union concerned, either desired it, as *In re N. Y. and Cuba S.S. Co.,* 2 N.L.R.B. 595 (1937); or did not oppose

it, as *In re Standard Oil Co. of New Jersey,* 8 N.L.R.B. 936 (1938); and in a number of very recent decisions—of which the case at bar is one—in which the wishes of the union alone were consulted.

5. *The question is not settled by any tradition of the maritime calling, in so far as licensed shipmasters are concerned.*

In the Opinion of the Circuit Court (R. 111), it is stated as though it were a fact that there is, in the history of the maritime calling in this Country, a long record of satisfactory collective bargaining between shipowners and their crews, which has included licensed shipmasters in its scope. There is no evidence in the record and no finding of fact which justifies this conclusion. It was based by the Court upon a possibly inadvertent assertion made in the Board's brief opposing the Petition for Review. In that brief, the assertion was made as an expression of the Board's "expert knowledge," without any reference to anything in the record.

Of course, such matters of "expert knowledge" cannot be considered in such a case, unless they be of such notoriety as to command judicial notice; and, if the Board chose to rely upon such contention, the contention should have been advanced for scrutiny and contest in its evidence at the hearing: *Crowell v. Benson,* 285 U. S. 22, 48; 76 L. Ed. 598, 611 (1931).

But, what is more important here, the contention was not sound in fact. There is a well-established tradition of collective bargaining by "supervisory employees" in the maritime calling—as the Board observed in its *Maryland Drydock* case; but the "supervisory em-

ployees" with whom collective bargaining was known before 1935 were marine engineers, mates and pilots—never licensed shipmasters. This is shown beyond dispute in the testimony in two of the Board's earlier cases, of which the relevant portions are reproduced at R. 128-167 of this record. In short, if the Board's presently held view, that shipmasters should be included in "appropriate units" of their subordinates, should be sustained, the result will be a new departure in the labor relations of seamen and maritime officers; and, for that matter, a new experiment in a field in which experimentation may easily prove disastrous.

II. The Decision of the Court Below Is in Conflict with Decisions of Other Cases in the Third, Sixth and Seventh Circuits.

1. *The decision is in conflict with that of the Third Circuit Court of Appeals in N. L. R. B. v. Delaware-New Jersey Ferry Co., 129 Fed. (2d) 130 (1942).*

In *N. L. R. B. v. Delaware-New Jersey Ferry Co.*, 129 Fed. (2d) 130 (3 C.C.A., 1942), the Board made an Order (30 N.L.R.B. 820) by which it required the operator of one of the Delaware River steam ferry lines to recognize one of the national labor unions as the exclusive representative of the masters, mates, engineers and other seamen employed on its boats. The Company refused to comply with this order; and, when the order was brought before the Court for enforcement, the Court refused to enforce it. It observed that public policy requires that marine officers be and remain at least as independent of any entangling obligations to

the seamen whom they command as are any other class of responsible officials:

> "* * * To group officers in command with employees who owe the duty to obey the commands in one bargaining unit seems to us to be dangerous."

—and held that, as the Board's order tended to infringe this public policy, it could not be enforceable:

> "It is true that few, if any, of the licensed officers object to being included in a bargaining unit with the unlicensed personnel. This is not a controlling factor although it is one which we have considered. But the point here is not what the officers want, nor what the men want, nor what the company either wants or is willing to acquiesce in, but rather what is the public interest. The Board's duty to serve the public interest cannot be affected by the desires or acquiescence of the parties. Granting that the determination of the appropriate bargaining unit is primarily a matter for the Board and that courts should be exceedingly careful to refrain from substituting their judgment for that of a duly constituted administrative body, none the less it seems to a majority of the court that in the case at bar the limits of the administrative discretion of the Board have been exceeded, and that the court should not grant an enforcement order based upon the bargaining unit as now constituted."

Under the Board's Order in this case, the licensed masters who command the Steel Company's steamers would be grouped, at least, in the same union with the mates and pilots who owe the duty to obey their commands, and probably also (considering the facts averred in the Petition for Leave to Adduce Additional Evi-

dence) into what is really one bargaining unit with the licensed engineers and the unlicensed seamen who complete the crews of their vessels.

2. *The decision is in conflict with those of the Sixth Circuit Court of Appeals in N. L. R. B. v. Jones & Laughlin Steel Corporation and N. L. R. B. v. Federal Motor Truck Company, 146 Fed. (2d) 718 (1945) and that of the Seventh Circuit Court of Appeals in N. L. R. B. v. E. C. Atkins and Company, ... Fed. (2d) ... (February 27, 1945).*[5]

In the two separate cases of *N. L. R. B. v. Jones & Laughlin Steel Corporation* and the *Federal Motor Truck Company* (146 Fed. (2d) 718, December 8, 1944), the Board held elections among the policemen employed, respectively, by a steel manufacturer and a motor truck manufacturer, and thereafter, by orders similar to those made in this case, required the employers to recognize, as the representatives of these employees, a labor union which had won the elections. It was the same union, in each case, which represented also the productive employees of the two employers; although—as the Board pointed out—the policemen in each case were segregated in a "separate unit" from that to which the productive workers belonged. Upon the Board's petitions for enforcement of its orders, the employers urged in the Circuit Court of Appeals that industrial police had not, traditionally, been subject to union organization; that

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[5]The Opinion in this case, not yet officially reported, appears in Vol. 16, *Labor Relations Reporter* at page 53.

their independence of the influence of productive workers, or productive workers' unions, was a prerequisite to their efficient discharge of their duties as policemen —particularly in time of war; and that the Board had, therefore, exceeded its lawful power and discretion in demanding recognition of the union as exclusive representative of these men. The Court quoted with approval the *Delaware-New Jersey Ferry Company* case, *supra;* described the false position of a plant policeman whose allegiance to his employer must be tempered by the need to maintain his "good standing" with his union; upheld the employers' contentions; and refused to enforce the Board's orders.

In *N. L. R. B. v. E. C. Atkins and Company,* ... Fed. (2d) ... (February 27, 1945), the situation was substantially the same, except that the employer relied principally upon the fact that the plant policemen were members of an Auxiliary Military Police Force, created by Presidential Executive Order at the beginning of the war, and supervised by the War Department. The Court held that, as members of the Auxiliary Military Police Force, the Atkins plant police could not be considered "employees" of the Company within the meaning of the National Labor Relations Act; but, in so holding, it approved expressly the principle on which the police cases of the *Jones & Laughlin Steel Corporation* and *Federal Motor Truck Company* had been decided in the Sixth Circuit: that, in its attempts to effectuate the policies of the National Labor Relations Act, the Board must always avoid any infringement of the purposes of any other federal law, or of any important consideration of public policy.

In all three of these police cases, it was urged in the Circuit Courts by the Board that it had frequently required the inclusion of plant policemen in "appropriate units," thus establishing a "pattern" of collective bargaining which, although not in keeping with any age-seasoned tradition, had nevertheless, as the Board asserted out of its expert knowledge, proved satisfactory and so won the Board's approval as a means of effectuating the policies of the National Labor Relations Act. The same argument was, in essence, made and relied upon by the Board, when this case was before the Circuit Court. In the same way, the Board urged in the police cases that, by subjecting industrial police to union organization, it had in no way impaired their capacity to discharge their legal duties to the general public and to their employers. That argument, too, is relied upon by the Board in this present case. But both of these arguments were rejected by the Circuit Courts which decided the police cases. Both Courts held that an employee whose legal duties require that he protect the interests of his employer and of the general public, even when those interests oppose those of other, subordinate employees, cannot lawfully be given a status, by order of the respondent Board, which involves him in the obligations of a brother union member to those subordinate employees. This principle applies as well or better to the licensed master of a steam vessel, as it does to an industrial policeman; and it follows that the decision in this case by the Court below is directly in conflict with the principle of the decisions of the police cases in the other two Circuits.[6]

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[6]The Board has, within a few days before this is written, filed its petition for writs of certiorari, in these

III. The Decision of This Case by the Circuit Court of Appeals Is Legally Unsound.

1. *The true rule, which should have governed the Board in this case, is that declared in the police cases.*

In the three police cases just considered, the Courts held that the Board cannot, in the exercise of its powers to establish "appropriate units," lawfully give jurisdiction over supervisory employees—such as industrial policemen or licensed shipmasters—to a labor union, if membership in that union will create obligations to subordinate employees which are likely to hamper the effectiveness of management or to embarrass the supervisory employee in the discharge of his duties to his employer and to the public.

It is submitted that this is the true rule, which should govern the Board in its decisions in all such cases as this.

It is this rule which would forbid a Board order giving to the union which represents the productive employees of a steel company, jurisdiction, against the Company's will, of its employment bargain with its president and executive officers. A bargaining "unit" so constituted would not be "appropriate" because it would, instead of effectuating the true policies of the Act, either defeat any possibility of efficient management of the

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three police cases, at docket numbers 1236, 1237 and 1238 of this term of this Court. Its principal ground for asking reviews here, is that the three cases present a question of general importance, which this Court should settle.

Company, or else nullify the effectiveness of the union as a representative of labor, or, finally,—if the practice became general—result in a revolution of industrial relations which Congress can never have contemplated when it passed this Act in 1935.

But the same rule which requires that corporate executives be excluded, ordinarily, from "appropriate units" of subordinate employees, applies as well to require the exclusion of the licensed master of any large steam vessel from a unit made up of his subordinates. In law and in fact, he is the sole effective representative of management aboard his ship, just as the corporate president is, ultimately, the effective representative of management in his corporation. If management is to be deprived of the independent judgment or the undivided loyalty of either officer, the results will be, not those contemplated by the Act or those necessary to effectuate its true policies, but instead an economic and industrial change of a nature which the Act did not intend.

That is enough to settle this case; for the powers and duties of the Board are limited by the true intent of the Act. This Court has treated the Act as a remedial statute,[7] and has given the Board all possible latitude in its plans to effectuate the policies of the Act. But, when the Board has misunderstood those policies, or misconstrued its own duty or over-estimated its own powers under the Act, the Court has not hesitated to overrule and reverse its decisions. Thus, in *Southern Steamship Co. v. N. L. R. B.*, 316 U. S. 31; 86 L. Ed. 1246 (1942), the Board determined that, to encourage collec-

[7] *Republic Steel Corp. v. N. L. R. B.*, 311 U. S. 7; 85 L. Ed. 6 (1940).

tive bargaining—in accordance with the policies of the Act—it was necessary to require a shipowner to reinstate certain seamen who had been discharged, for mutinous conduct intended to support their labor union. This Court held that the Board's order must be set aside, saying:

> "* * * the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

In that case, the need for effectuating the policies of the National Labor Relations Act was overbalanced by the greater need of preserving order and discipline in the merchant marine. The same rule applies where the policies of this Act, if carried too far, will tend to infringe any other consideration of public policy. Thus, in *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177; 85 L. Ed. 1271 (1941), the Board ordered a mining company to reinstate certain employees who had been wrongfully discharged, with full back-pay, and without credit for amounts of earnings deliberately lost, by certain of the employees, as a result of their wilful refusal to take other, available employment. The Board held, in effect, that to discourage unlawful discharges and so to effectuate the policies of the Act, it was desirable and proper to permit any employee wrongfully discharged to await his reinstatement in idleness, and so to collect full, back wages. The Board's argument had much to commend it

in logic, at least if the National Labor Relations Act were considered to express the entire body of the law; but this Court held that the policies of the Act cannot be held to encourage idleness: that it cannot be supposed in the absence of words which say so, that Congress intended, by this Act, to overturn the long established public policy which encourages industry. Therefore, the Court set the Board's order aside, saying:

> "* * * the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. * * *
>
> "* * * By leaving such an adjustment to the administrative process we have in mind not so much the minimization of damages as the healthy policy of promoting production and employment."

The essential principle of this decision has its bearing here. Under the common law, and under the federal statutes, the licensed master of every steam vessel occupies a peculiar legal status. The law gives him the broadest powers to control and discipline the officers and seamen who are under his command; and, at the same time, it burdens him with a multitude of legal duties to his employer, to his subordinates, and to the public at large. The maritime law on the subject reflects of course a public policy, born of experience which has taught Congress and the Courts of Admiralty that, to discharge the duties commonly incident to his work, such an officer must have commensurate powers, and a commensurate independence of the good- or ill-will of those whom he commands. If Congress had intended to modify this policy, expressed in this great body of traditions and laws of the sea, when it passed the National Labor Relations Act in 1935, the purpose would have been expressed

with words of much greater definiteness and clarity than any which can be found in the Act.

Or, to look at the same matter from another direction, this Act was intended to accomplish only the purposes recited in its preambles: to augment the power of labor and its unions to bargain fairly with management—not to enable them to defeat or destroy management; to improve employment and wages—not to justify social experimentation with the unrelated, normal controls of the industries which must provide both; and to promote interstate commerce by encouraging the prosperity of working people and discouraging strikes—but not to hamper or discourage the efficient direction, by their owners, of the facilities of commerce. In short, as both this Court[8] and the Board[9] have declared, the Act intended no interference with the security and freedom of management beyond that required to assure the security of labor, and the independence of labor unions. And since control of the shipmasters in this case is a legitimate necessity to free and efficient management, but of no legitimate importance to the freedom or security of the unions, it must follow that the Board has misconstrued the Act.

Respectfully submitted,

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[8]See *N. L. R. B. v. Jones & Laughlin Steel Corporation,* 301 U. S. 1, 45; 81 L. Ed. 893, 916 (1937).

[9]See *"Third Annual Report of the National Labor Relations Board,"* page 65.

APPENDIX.

NATIONAL LABOR RELATIONS ACT

Act of July 5, 1935, c. 372; 49 Stat. 449; 29 USCA §§ 151-166.

AN ACT

To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are

organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SECTION 2. When used in this Act—

* * * * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or

political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * * * *

RIGHTS OF EMPLOYEES

SECTION 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SECTION 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment

to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS

SECTION 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SECTION 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objec-

tion that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides

or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1294

JONES & LAUGHLIN STEEL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 109–112)[1] is reported in 146 F. 2d 833. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 61–66, 84–90) are reported in 54 N. L. R. B. 679. The decision of the

[1] "Volume I—Transcript of Record," printed by petitioner and containing the pleadings before the Board, the decisions and orders of the Board, and the opinion of the court below, is herein referred to as "R." The volume printed by petitioner as an appendix to its brief in the court below is herein referred to as "P. A."

Board in a prior representation proceeding which forms part of the record in this case (R. 29–35, 37–38, 44–45) is reported in 47 N. L. R. B. 1272 and 51 N. L. R. B. 1204.

JURISDICTION

The decree of the court below (R. 168–170) was entered on March 16, 1945. The petition for a writ of certiorari was filed on May 19, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board, in the exercise of its discretion, may properly designate as appropriate a collective bargaining unit composed of licensed deck-officer personnel, including masters.

2. Whether, notwithstanding the fact that they are the highest-ranking representatives of management on the vessels, masters may properly be included in a single unit with mates and pilots, who are second-ranking management representatives and who share with the masters a common interest in working conditions.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat.

449, 29 U. S. C., Sec. 151 *et seq.*) are set forth in the Appendix, *infra*, pp. 20–22.

STATEMENT

In a proceeding under Section 9 (c) of the Act for the investigation and certification of representatives, instituted by National Organization of Masters, Mates and Pilots, Local 25, affiliated with the American Federation of Labor, the Board, after a hearing, issued a decision and direction of election finding that the masters, mates and pilots, who together comprise the licensed deck-officer group on petitioner's riverboat vessels, constituted a single appropriate bargaining unit (R. 17–19, 29–35). At the election, the petitioning union was selected by a majority of the eligible employees in the designated unit and was certified by the Board as the exclusive bargaining representative of the licensed deck officers on petitioner's vessels (R. 36, 37–38). The Board thereafter denied petitioner's motion to reconsider and to set aside the certification (R. 39–45).

Subsequently, in a proceeding under Section 10 (c) of the Act, the Board issued a decision finding that petitioner had refused to bargain collectively with the certified representative of its licensed deck officers and had thereby engaged in unfair labor practices within the meaning of Section 8 (5) and (1) of the Act (R. 63–66, 83–90). The Board issued an order requiring peti-

tioner to cease and desist from refusing to bargain collectively with the certified representative (R. 90–91). After appropriate proceedings, the court below, on January 18, 1945, decided that the Board's order should be enforced (R. 109–112) and on March 16, 1945, entered its decree enforcing the Board's order (R. 168–170).

The evidence in support of the Board's finding that the deck officers constitute an appropriate bargaining unit may be summarized as follows:

The masters, mates, and pilots are all supervisory employees and together constitute the deck-officer stratum on petitioner's vessels (P. A. 14a–15a, 19a). Together, they are responsible under federal regulations for the proper operation and maintenance of the vessel and must conform to similar standards of faithful performance of duty (46 U. S. C. 226, 228, 239). All three groups have comparable qualifications, training, and skills; perform similar operational functions on the vessels; and supervise and discipline the unlicensed crew (P. A. 14a–15a, 18a–19a; R. 32; *Matter of Jones & Laughlin Steel Corp.*, 37 N. L. R. B. 366). Appointment to any one of these positions is typically achieved by promotion from the rank below (P. A. 20a–21a). All three groups have for many years been eligible for membership in the certified union, which limits its jurisdiction to these classes of maritime personnel (P. A. 156a).

Although the master is the highest-ranking official on the vessel and endowed with a greater degree of responsibility for its maintenance and operation and for the discipline of the crew than are the mates and pilots, he is not a policy-making executive and does not participate in the formulation of labor-relations standards or employment conditions either for the other deck officers or for the unlicensed crew. On all 10 of petitioner's vessels he is under the close supervision of the home office, receiving instructions at the outset of the voyage and during its course and reporting to the home office upon its completion (P. A. 13a–14a, 17a–18a, 23a, 25a–29a, 32a, 180a–184a, 191a; R. 27–28). Seven of these vessels make round trips averaging from 32 to 48 hours; the other 3 make longer trips but are in frequent contact with the home office during the course of the voyage (*ibid.*). There is no evidence that the master has the power to hire or discharge other licensed deck officers. And his authority to hire and discharge unlicensed personnel is greatly limited and subject to the approval of the home office (P. A. 18a, 158a, 160a, 173a, 175a–176a, 186a–187a, 188a–190a). A master usually rises to that position after serving as mate or pilot; and will not infrequently sail as a mate or pilot even though licensed as a master (*Matter of Seas Shipping Company*, 8 N. L. R. B. 422, 423–424).

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Upon this evidence and in conformity with its established administrative policy of including masters in a single unit with mates and pilots, the Board found that the policies of the Act would best be effectuated by grouping masters in the same bargaining unit with mates and pilots (R. 32).

ARGUMENT

1. Petitioner contends that the Board exceeded the allowable limits of its discretion by including masters in a single unit with mates and pilots, urging that such grouping will hamper the masters in the performance of their duties as management representatives and consequently fails to effectuate the policies of the Act (Pet. 27–31).

The standard by which the Board is to be guided in formulating a finding as to appropriate unit in any case is that of insuring to the employees involved "the full benefit of their right to self-organization and to collective bargaining" and otherwise effectuating the policies of the Act (Section 9 (b)). The power to designate the unit appropriate for collective bargaining in any case is thus one which stems from the Board's discretion, consistently recognized to be of great latitude and to encompass specialized and expert knowledge in the field of labor relations. If, from the evidence or from its knowledge of the labor-relations structure as it bears upon the evidence, the Board has made its finding upon relevant con-

siderations which show a reasonable basis for its conclusion that the unit designated as appropriate will effectuate the policies of the Act, the finding will not be overturned on review. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U. S. 146; *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U. S. 111, 134–135; *Marlin-Rockwell Corp.* v. *National Labor Relations Board,* 116 F. (2d) 586–587 (C. C. A. 2), certiorari denied, 313 U. S. 594; *National Labor Relations Board* v. *Clarksburg Publishing Co.,* 120 F. (2d) 976, 980 (C. C. A. 4); *National Labor Relations Board* v. *Chicago Apparatus Co.,* 116 F. (2d) 753, 755 (C. C. A. 7); *National Labor Relations Board* v. *Lund,* 103 F. (2d) 815, 819 (C. C. A. 8); *International Ass'n of Machinists* v. *National Labor Relations Board,* 110 F. (2d) 29, 34–35 (App. D. C.). To establish that a unit finding is arbitrary it must be shown that the unit designated is not reasonably related to the statutory objective of promoting effective collective bargaining and is without warrant in the evidence, or in prevailing and applicable labor-relations patterns, or in the settled customs of collective bargaining.

The Board's unit finding in this case, combining all licensed deck officers, including masters, for the purpose of collective bargaining and representation by a union admitting only such personnel, is one which was dictated by its judgment as to how

such classes of employees should be grouped for the most satisfactory realization of their statutory guarantees of concerted representation. While recognizing that the master is the chief management representative on the vessel, the Board considered that this circumstance alone was, in view of other relevant factors, insufficient to warrant his isolation from the mates and pilots for purposes of collective bargaining. Their common duty of maintaining efficient operation of the vessel and discipline among the crew; the essential similarity of their operational functions, skills, and qualifications; the same degree of loyalty, courage and efficiency required of all three by petitioner's rules and federal standards for faithful performance of duty; the interest of each class of officers in the working conditions of the other, engendered in the mates and pilots by the custom of rising to the rank of master and in the masters by the not infrequent necessity of having to sail as lower-ranking officers; and their eligibility for membership in the petitioning union are the factors which the Board considered as controlling in delineating the form of bargaining unit for the licensed deck officers. These facts showed them to be a cohesive group, who together represent management in the eyes of the crew and are closely allied by similar working conditions and skills in their welfare as employees. In addition, the union which petitioned for their representation in a combined unit had for many years been ad-

mitting all three classes to membership, thereby demonstrating the feasibility of bargaining for all three. The Board, consequently, in the exercise of its discretion, found that all three classes of officers could most fully enjoy their right to collective bargaining if grouped together in a single unit rather than if separated into two units, as now urged by petitioner. This Court has held that the formulation of a unit finding on evidence of similarity of function, skills and training, of a common interest in working conditions, and of general feasibility is sufficient to establish the reasonableness of the Board's finding. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U. S. 146; *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U. S. 111.

Petitioner's assertion that the Board abused its discretion by placing masters in a single unit with mates and pilots is based upon petitioner's belief that such association for collective bargaining will necessarily create a conflict of loyalties in the masters, dissipating their effectiveness as management representatives and thus bringing about a weakening of management controls—a consequence not contemplated by and, indeed, in conflict with the purposes of the statute (Pet. 27–28). But such an assumption, grounded upon no more than empty speculation, negates the basic philosophy of the Act and the experience out of which it grew. It was just such economic dislocation as petitioner fears that the Act was designed to cure by provid-

ing for orderly and effective collective bargaining through units which the Board in its expert judgment deemed most suitable and appropriate.[2] In deciding the question of appropriate unit in this case, the Board gave full consideration to petitioner's argument and found from the evidence and established tradition and practice that petitioner's misgivings were not only without reasonable support in reality but had also long since been dispelled by a well-defined history of maritime labor relations.

From the first year of its existence the Board has been confronted with the question of how various classes of maritime employees shall be grouped for collective bargaining. Careful consideration of the problems involved has led the Board to evolve a standard and consistent policy in the designation of appropriate units in the maritime trades.[3] In the cases involving masters,

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[2] In *Matter of Packard Motor Car Co.*, 61 N. L. R. B., No. 3, decided March 26, 1945, the Board has discussed and rejected the not infrequent contention of employers that organization for collective bargaining tends to impair efficiency.

[3] Thus the Board early formulated and has since consistently adhered to the policy of separating into different units licensed engineers and licensed deck officers on the ground of a basic difference in function and training between the two groups. *Matter of Delaware-New Jersey Ferry Company*, 1 N. L. R. B. 85; *Matter of Black Diamond Steamship Corporation*, 2 N. L. R. B. 241; *Matter of Panama Rail Road Company*, 2 N. L. R. B. 290; *Matter of Grace Line, Inc.*, 2 N. L. R. B. 369. At the same time, the Board initiated the practice of including within a single unit various levels of supervisory engineers on the ground that the general similarity of their

mates and pilots, the Board has, in reliance on established bargaining tradition by these groups as a unit [4] and in the light of the salutary experience developed by its own earlier decisions, uniformly designated as appropriate a single unit of masters, mates and pilots.[5] In a number of these cases, where the employer or the union requested the exclusion of the master on the ground

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skills, qualifications and functions gave them a common interest in working conditions. *Matter of International Mercantile Marine Company*, 1 N. L. R. B. 384; *Matter of Swayne & Hoyt*, 2 N. L. R. B. 282.

[4] Organization and collective bargaining of these three classes of officers have been accepted in the maritime industries for more than 40 years. Twentieth Century Fund, *How Collective Bargaining Works*, 1942, p. 938; H. E. Hoagland, *Wage Bargaining on the Vessels of the Great Lakes*, University of Illinois Studies in the Social Sciences, Vol. VI, No. 3, Urbana 1917.

[5] *Matter of Ocean Steamship Company of Savannah*, 2 N. L. R. B. 588; *Matter of New York and Cuba Mail Steamship Company*, 2 N. L. R. B. 595; *Matter of Seas Shipping Co.*, 8 N. L. R. B. 422; *Matter of Standard Oil Company of New Jersey*, 8 N. L. R. B. 936; *Matter of New York and Cuba Mail Steamship Company*, 9 N. L. R. B. 51; *Matter of Tide Water Associated Oil Company*, 9 N. L. R. B. 823; *Matter of Cities Service Oil Company*, 10 N. L. R. B. 954; *Matter of The Texas Co.*, 23 N. L. R. B. 1022; *Matter of A. H. Bull Steamship Co.*, 36 N. L. R. B. 99; *Matter of Carnegie-Illinois Steel Corp.*, 37 N. L. R. B. 19; *Matter of Jones & Laughlin Steel Corp.*, 37 N. L. R. B. 366; *Matter of Dravo Corporation*, 39 N. L. R. B. 846; *Matter of International Mercantile Marine Co.*, 1 N. L. R. B. 384; *Matter of Lykes Brothers Steamship Co., Inc.*, 2 N. L. R. B. 102; *Matter of Black Diamond Steamship Corp.*, 2 N. L. R. B. 241; *Matter of Swayne & Hoyt, Ltd.*, 2 N. L. R. B. 282; *Matter of Grace Line, Inc.*, 2 N. L. R. B. 369.

that he was the chief representative of management on the vessel, the Board, after analysis of the record and study of maritime bargaining experience, concluded that there was no reason to believe that the inclusion of masters in a single unit with mates and pilots was incompatible with the faithful performance of their duties by the masters.[6] And not inconsistent with this policy are the two cases in which the Board has excluded masters, not in deference to the assumption of incompatibility with faithful performance of duty but in conformity with its practice of not disturbing a bargaining pattern voluntarily and successfully developed by the parties before resorting to Board procedures.[7] *Matter of United States Lines Co.*, 28 N. L. R. B. 896; *Matter of Detroit and Cleveland Navigation Company*, 29 N. L. R. B. 176.[8]

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[6] Of the cases cited in note 5, *supra*, see *Matters of Seas Shipping Co., Standard Oil Company of New Jersey, New York and Cuba Mail Steamship Co., Tide Water Associated Oil Company, Cities Service Oil Company, The Texas Co., Carnegie-Illinois Steel Corp., Jones & Laughlin Steel Corp.*

[7] National Labor Relations Board, *Third Annual Report* (Gov't Print. Off., 1939), pp. 160–163; *Eighth Annual Report* (Gov't Print. Off., 1944), p. 53.

[8] *Matter of United Dredging Co.*, 30 N. L. R. B. 739, is incorrectly mentioned by petitioner (Pet. 20) as a case in which the Board excluded masters from representation in a unit with mates and pilots. The Board there excluded all supervisors, including masters, mates, engineers and others from a unit of unlicensed personnel.

This has continued to be the Board's practice, and it has been reexamined and unanimously reaffirmed from time to time by the Board in shaping its policy as to appropriate units for supervisors in other industries. *Matter of Union Collieries Coal Co.*, 41 N. L. R. B. 961, 966, 971; *Matter of Maryland Drydock*, 49 N. L. R. B. 733, 741, 743, 750; *Matter of Packard Motor Car Co.*, 61 N. L. R. B., No. 3, decided March 26, 1945. That the Board's expert judgment has been correct and that collective bargaining through a unit composed of masters as well as mates and pilots has in practice had none of the insidious results envisaged by petitioner may well be assumed from the failure during the past ten years of the maritime employers, or unions, or masters themselves to seek a revision of the all-inclusive unit designated for them by the Board on the ground that actual experience has shown that such grouping in fact impairs the master's efficiency as a management representative. This successful bargaining experience refutes petitioner's *a priori* judgment that the adherence of masters to the same unit as mates and pilots will necessarily weaken the effectiveness of management controls. In any event, petitioner is not without an adequate remedy should the unit found by the Board prove impracticable or detrimental to its interests, for the court below enforced the Board's bargaining order "without prejudice to an application to the Board

or to us to reopen the case should unusual difficulties in fact arise in the operation of this bargaining unit" (R. 112).

2. Petitioner contends that the decision of the court below is in conflict with *National Labor Relations Board* v. *Delaware-New Jersey Ferry Co.*, 128 F. (2d) 130, decided by the Circuit Court of Appeals for the Third Circuit, with *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation* and *National Labor Relations Board v. Federal Motor Truck Company,* 146 F. (2d) 718, decided by the Circuit Court of Appeals for the Sixth Circuit, and with *National Labor Relations Board* v. *E. C. Atkins and Company,* 147 F. (2d) 730, decided by the Circuit Court of Appeals for the Seventh Circuit (Pet. 22–26).[9] The Board perceives no conflict between the decision of the court below and the decisions in the cases cited by petitioner. While the issue in the instant case bears a superficial resemblance to the others in that in all the broad question presented for review below was the propriety of a unit finding made by the Board, the issues decided by the court below and here presented by petitioner are as to all material facts substantially different from those involved in the other cases.

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[9] In the last three cases cited this Court, on June 4, 1945, granted writs of certiorari, vacated the judgments and remanded the cases to the circuit courts of appeals for further proceedings.

In the *Delaware-New Jersey* case, the Board had found as appropriate a single unit comprising captains and other licensed officers as well as unlicensed crew personnel. The court held that the commingling of officers with ordinary members of the crew was contrary to the public interest, as the conflict of loyalties which such common grouping might engender in the officers placed the faithful performance of their duties and the interests of the public in possible jeopardy. It therefore overturned the Board's unit finding—not, as the petition might lead this Court to suppose, because captains or masters were placed in a unit with other licensed deck officers, but because they and the other licensed deck officers were included in a single unit with the unlicensed crew. The Board's unit finding in the instant case is plainly in accord with the court's decision in the *Delaware-New Jersey* case, for here the Board separated out the licensed officers and designated them as a unit apart from the crew over whom they exercise supervision. Indeed, this unit delineation more than satisfies the requirement of that court that the officers be segregated from the crew in collective bargaining, for here the union representing the deck officers, including the masters, limits its membership and representation to licensed deck officers and is not even affiliated with the same parent organization which represents the engineers and the crew (P. A. 33a–34a, 156a).

In the *Jones & Laughlin, Federal Motor Truck* and *Atkins* cases the employees involved were militarized plant guards. Although the companies in those and similar cases involving guards had contended to the contrary, it is clear that the guards are not supervisory employees, and the courts in those cases did not hold that they were. The problem presented in those cases was thus not the same as in the case at bar.

Moreover, in the *Jones & Laughlin* and *Federal Motor Truck* cases, the Board found as appropriate for each plant a single, separate unit composed of the militarized plant protection force and certified as their representative a union which also represented, in another unit, the production and maintenance employees (Board pet. for writ of certiorari in Nos. 1236, 1237, 1238, filed with this Court May 5, 1945, p. 13). The court held that due regard for wartime security rendered improper the certification of a representative which also bargained for the production and maintenance workers (*ibid.*). In the instant case, the union certified by the Board as bargaining representative for the unit found appropriate is one which limits its membership to the classes of employees who constitute the unit, is affiliated with the American Federation of Labor, and does not bargain for the remaining personnel on the vessels, who are in turn represented in two separate units by affiliates of the Congress of Industrial Organizations (*Matter of Jones & Laughlin Steel Corporation,* 37 N. L. R. B. 366, 368–369).

The court below considered the decisions of the Circuit Courts of Appeals for the Third and Sixth Circuits and found no conflict between them and its decision in the instant case (R. 110, 112).

In the *Atkins* case, decided after the instant case, the court held that militarized plant guards are not "employees" within the meaning of the Act and are, therefore, not subject to the Board's power to designate appropriate units for collective bargaining.[10] Petitioner has never contended, nor does it now contend, that its masters are not employees for purposes of the Act.

The Board believes that petitioner's contention of conflict stems from a misconstruction of the decision and opinion of the court below. Petitioner assumes that the Board and the court below accepted as a fact the unsupported allegation in its motion to adduce (R. 96–103) that the three unions representing respectively the masters, mates and pilots, the engineers, and the unlicensed personnel have so amalgamated their leadership and functions as to constitute for all practical purposes a single organization (R. 101–102). Were petitioner's assertion in fact correct, it is conceivable that there might perhaps be said to exist the conflict which petitioner now claims to see. If the licensed officers were, by arrangement of the unions, joined together in a bargaining unit

[10] The *Atkins* decision in the Circuit Court of Appeals also approved the reasoning of the Sixth Circuit in the *Jones & Laughlin* and *Federal Motor Truck* cases.

with the unlicensed personnel and the court below accepted this as fact but nevertheless upheld the Board's unit finding, the decision in this case might then possibly be viewed as contrary to that in *Delaware-New Jersey*. And, more remotely, if militarized plant protection employees were considered to be indistinguishable from masters of vessels; if mates, pilots, engineers and unlicensed seamen were regarded as no different from production and maintenance employees in an industrial plant; and if the union certified by the Board for the masters as well as the mates and pilots had in fact been proved to represent also the other classes of maritime personnel, a conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the plant protection cases might be said to exist.

But the Board, in opposing the motion to adduce, and the court below, in denying the motion, agreed that the allegations made by petitioner in support of its conclusion that the three unions were in fact one did not, even if they were assumed to be true, establish that conclusion (R. 111–112).

CONCLUSION

The decision of the court below is correct. While involving questions of general importance, it gives rise to no conflict of decisions and merely sustains an exercise by the Board of discretionary powers which this Court has recognized that Con-

gress conferred on the Board. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1945.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., sec. 151 *et seq.*) are as follows:

> SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.
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> * * * * * *
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> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.
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> * * * * * *
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> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunc-

tion with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

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SEC. 10. (e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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